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No. 83-436

In the Supreme Court of the United States

OCTOBER TERM, 1983

DONALD REGAN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

RUTH WALD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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1. The question raised by this case is the proper scope of the grandfather clause, Section 101(b) of Pub. L. No. 95-223, 91 Stat. 1625, giving the President continuing power to exercise certain authorities under the Trading With the Enemy Act, 50 U.S.C. App. 1 *et seq.* In the section of respondents' brief in opposition titled "*Statutory Language*" (Br. in Opp. 22-26), respondents state that the grandfather clause continues "only those prohibitions and restrictions 'being exercised' on July 1, 1977" (*id.* at 22) and permits the President only to impose "existing *prohibitions*" (*id.* at 25; emphasis in original). But the grandfather clause does not say that existing "prohibitions" and "restrictions" may continue; it says that the President may continue to use the "*authorities*" conferred on him by the TWEA and being exercised on July 1, 1977. The problem of this case is whether, by this language, Congress intended to

freeze the precise restrictions in place on July 1, 1977, or whether Congress's explicit purpose —to grandfather existing embargoes in order to avoid the need to declare a new emergency with respect to Cuba (and Vietnam, Cambodia, and North Korea) (see Pet. 23-24) — encompasses the traditional authority to modify those embargoes in light of changing foreign policy needs. That problem of interpretation cannot be made to disappear by the simple ipse dixit of substituting the words "prohibitions and restrictions" for the term "authorities" in paraphrases of the statutory language.

2. Respondents state that the government is "challenging * * * the mandate of Congress in IEEPA" and that our "arguments are directed at IEEPA as a whole" (Br. in Opp. 19); they contend that the solution to this case is for the President to "use * * * IEEPA" (*id.* at 21).

In fact, the government has no quarrel with the procedures Congress has required under IEEPA, which the government has used in connection with newly developed foreign policy crises (*e.g.*, the Iranian hostage situation). What we have asserted is that, for the President to declare a *new* "national emergency" with respect to Cuba because the Cuban situation presents an "unusual and extraordinary threat * * * to the national security, foreign policy, or economy of the United States" (50 U.S.C. (Supp. V) 1701), would be a grave step with serious foreign policy implications. That assertion should not be casually disparaged by those who have no responsibility for carrying on the foreign policy of the United States. Whether the declaration required by IEEPA should be made for the purpose of modifying a long-existing embargo is precisely the question the President will face if certiorari is denied in this case. Our submission, simply, is that the President should not be forced to decide that question without an authoritative ruling by this Court whether the court of appeals was

correct in concluding that the grandfather clause, rather than preserving the Cuban embargo as an on-going system of prohibitions subject to adjustment, in effect created a *two*-track system for dealing with property transactions involving Cuba — one under the pre-existing national emergency declaration under the TWEA, which authorizes restrictions on the purchase of Cuban machinery, sugar, and cigars, and a second, under which a new and different national emergency declaration would have to be made to restrict the purchase of Cuban hotel and airline space by ordinary tourists and business people wishing to visit Cuba.

In sum, the question before the Court is not whether the IEEPA procedures are sound or desirable, but whether they apply to modifications of the pre-existing Cuban embargo. That is an important question, with significant implications for the flexibility available to the President in the management of our difficult and sensitive relations with the Government of Cuba.

3. Respondents issue a dark warning that if the Court grants certiorari, this "would require" (Br. in Opp. 38) the Court to decide several statutory and constitutional questions raised by the respondents below.

It is true that respondents raised various statutory and constitutional objections to the regulations at issue in this case, in addition to the contention accepted by the court of appeals. And we assume that if this Court should decide that the President's authority to issue these regulations was grandfathered, respondents' additional statutory and constitutional objections to the regulations might then come into play. But it is not true that this Court would be "require[d]" to decide these issues or would "have to reach" them (Br. in Opp. 38, 39). These issues were not passed on by the court of appeals, and could in the first instance be considered by it on remand.

In any event, it seems anomalous to ask the Court to deny certiorari on an important and grave question affecting the Executive's foreign policy authority, on the ground that there are *other* important and grave questions potentially raised by this case. The purpose of the certiorari jurisdiction is to afford the Court the discretion to focus on important cases; respondents' additional contentions do not detract from, but rather add to, the public significance of this litigation.

For the foregoing reasons and those presented in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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